

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
2000 APR 14 PM 3:58
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Synteon Technologies, Inc.

C/A No. 00-02203-W

JUDGMENT

Chapter 11

Debtor.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Debtor is authorized to pay the pre-petition claim of Marchem in the amount of \$47,177.89.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 14, 2000.

ENTERED

APR 17 2000

J.G.S.

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IN RE:

Synteen Technologies, Inc.

C/A No. 00-02203-W

ORDER

Chapter 11

Debtor.

THIS MATTER comes before the Court upon Synteen Technologies, Inc.'s ("Debtor") Motion for Order Authorizing Debtor to Pay Certain Pre-Petition Claims ("Motion") filed on March 10, 2000. A preliminary hearing was held on March 16, 2000, and by Order entered March 24, 2000, the Court granted in part and denied in part Debtor's Motion. The Court denied at that time Debtor's request to pay the pre-petition claim of Marchem Dublon, Inc. ("Marchem"), pending a final hearing on the Motion. Rutland Plastics Technologies, Inc. ("Rutland") objected to the Motion and was present at the final hearing to prosecute its objection. After considering the pleadings filed, the evidence presented at the hearing on the Motion, and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.¹

FINDINGS OF FACT

1. On March 10, 2000, Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Debtor is operating its business as debtor-in-possession pursuant to 11

¹ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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U.S.C. §§1107(a) and 1108² of the Bankruptcy Code.

2. Notice of the hearing on Debtor's Motion appears to have been properly served on all creditors and parties in interest.

3. Debtor is a company with forty-four (44) employees and engaged in the business of manufacturing and distributing technical industrial textiles in the North American market. Debtor converts fiberglass and polyester yarns into fabric which is then used as a reinforcement mesh in synthetic stucco; as the primary reinforcement in soil retaining wall applications and soil stabilization applications (collectively "geogrid"); in asphalt overlay applications; in welding and other high temperature applications, such as insulation; and as a reinforcement in single-ply roofing membranes.

4. In its Motion, Debtor seeks to pay the pre-petition claim of Marchem in the amount of \$47,177.89. Marchem provides a coating for Debtor's geogrid which was developed specifically for Debtor.

5. If Marchem's pre-petition claim is not paid immediately, Marchem indicated that it will cease providing its products to Debtor.

6. Debtor's production of geogrid constitutes forty percent (40%) of its overall business.

7. Pursuant to an oral agreement between Debtor and Marchem, Marchem agreed not to provide the coating to any of Debtor's competitors; however, under the agreement, Debtor is not required to purchase a set amount of product from Marchem.

8. Rutland is an unsecured trade creditor of Debtor in the approximate amount of

² Further references to the Bankruptcy Code shall be by section number only.

\$34,749.60. Rutland manufactures a coating similar in nature to Marchem's and has provided such product to Debtor in the past.

9. Rutland and Marchem are essentially competitors in the market place. Not only do Marchem and Rutland compete for customers, but, in the past, they have also competed for qualified employees. In fact, Marchem's sales/marketing representative which deals with Debtor's account formerly serviced Debtor in the same capacity for Rutland.

10. As of the date of the hearing, Debtor had a limited supply of Marchem's product, less than a week's worth. Debtor needs more of Marchem's coating in order to fill a major order; furthermore, because the business is entering its busy season, its continuing operations would be seriously jeopardized if it were forced to suffer a delay in the provision of the coating.

11. Rutland indicates that it can meet the specifications of Marchem's product with its own new product for Debtor's use within two to four weeks.

12. Rutland filed an Objection to the Motion for Entry of Order Authorizing Debtor to Pay Certain Pre-Petition Claims on March 22, 2000.³

CONCLUSIONS OF LAW

Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." In addition, bankruptcy courts have inherent equitable power under §105(a) to "issue any order, process, or judgment that is necessary to carry out the provisions of this title." While

³ Prior to filing the formal objection, on or about March 16, 2000, Rutland filed a letter with the Court indicating that they objected to the proposed payment of the pre-petition claim of Marchem.

authorization to pay a pre-petition claim is an extraordinary relief, the equitable powers as specified in §105(a) give bankruptcy courts the permission to allow payment of a pre-petition claim “when essential to the continued operation of the debtor.” In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992). As the court in In re NVR noted, however, “section 105 may not be used as a vehicle to discriminate among priority claims when there is no compelling business need for such discrimination.” *Id.*⁴

Generally, in order for the court to authorize the payment of a pre-petition claim, the movant must meet the “necessity of payment” rule which “recognizes the existence of the judicial power to authorize a Debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of Debtor.”⁵ In re Ionosphere, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also In re Boston and Maine Corp., 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to debtor’s continued operation); In re Eagle-Picher Ind., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (“In applying the view of

⁴ The parties agree that precedent in the Fourth Circuit does not establish a *per se* rule against the authorization to pay pre-petition claims. See, e.g., Official Committee of Equity Security Holders v. Mabey (In re A.H. Robbins Co., Inc.), 832 F.2d 299, 302 (4th Cir. 1987).

⁵ In analyzing the Fourth Circuit decision of In re A.H. Robbins Co., Inc., 832 F.2d at 302, the court in In re NVR noted in a footnote:

The Fourth Circuit has interpreted §105(a) as generally not permitting a distribution to unsecured creditors in a Chapter 11 proceeding except under and pursuant to a plan of reorganization that has been properly presented and approved. However, it is unclear whether the broad language in Mabey failed to address the “necessity of payment” exception deliberately or by happenstance. This court assumes the latter for purposes of this opinion since the “necessity of payment” rule was not directly at issue in Mabey.

In re NVR, 147 B.R. at 127 n.2.

the law which we adopt, we consider that to justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”); In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D. N.Y. 1989) (quoting In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3rd Cir. 1981) (“The ‘necessity of payment’ doctrine . . . ‘[permits] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid.’”). The “rule of necessity” is not one of mere convenience; and, in proposing payment of a pre-petition obligation, the movant must show a “compelling business justification” that is in the best interest of both the debtor and other creditors. In re NVR, 147 B.R. at 127. Courts usually take into consideration whether the payment of the obligation at issue is critical to the reorganization of debtor’s business or fundamentally necessary to the continuation of debtor’s operations. *Id.*

In the case now before the Court, Debtor has proved that a compelling business justification warrants payment of Marchem’s claim. Rutland objected on the ground that Debtor has failed to show that it cannot obtain a similar or identical product from another vendor without the necessity of paying pre-petition claims. Rutland further argued that it has previously sold similar coating products to Debtor and presently offers to supply Debtor with either the product it formerly produced for Debtor or with any modified version of the product that Debtor might require, without payment of the pre-petition claim held by Rutland.

First, the Court finds that Marchem’s coating and the coating that Rutland has previously sold to Debtor do differ. Testimony offered by Debtor at the hearing on the Motion indicated that Debtors’ management believes that Marchem’s coating is more durable and resistant and is better suited for Debtor’s application than Rutland’s present product. As to Rutland’s argument

that it can produce a comparable product to Marchem's and provide Debtor a sample of the coating in approximately two to four weeks; the Court concludes that such a time delay in the provision of the product would interrupt the continuing operations of Debtor which in turn would harm the bankruptcy estate and all creditors.

At the hearing on the Motion, counsel for Marchem indicated that the demand that it be paid its pre-petition claim before it will further provide Debtor its products was unequivocal. Evidence indicates that Marchem's pre-petition claim represents the first significant billing due to Marchem since its new relationship with Debtor; therefore, the claim is seen as more critical to their business dealings. The Court finds that Debtor has a genuine need for Marchem's product and ongoing contracts with clients currently require additional coating from Marchem in order for Debtor to fulfill its obligations. Due to the technical and specialized nature of the products in question, the Court shall not second guess Debtor's business judgment and in effect mandate that Debtor use another supplier's coating. Debtor has decided that the Marchem product is a superior product and essential to Debtor's business.⁶ Furthermore, Debtor cannot afford any delays at this time, given the fact that it presently needs the coating in order to fill its customers' current orders. It is therefore,

ORDERED that Debtor is authorized to pay the pre-petition claim of Marchem in the

⁶ The Court would caution that its recognition of a debtor's business judgment in the context of the payment of pre-petition claims is not a blank check. A debtor has a fiduciary duty to all creditors of the bankruptcy estate. To fulfill its duty when faced with a demand by an essential supplier for payment of a prepetition claim, a debtor must attempt to negotiate the most lenient payment terms possible. As such, even though the Court has authorized payment of the Marchem pre-petition claim, Debtor, in fulfilling its fiduciary duty to protect all creditors, should use its best efforts in good faith to negotiate with Marchem in an attempt to pay the pre-petition amount over time. A lump-sum payment, in fact, would most likely strain Debtor's finances. Debtor also has a fiduciary duty to continue examining comparable products and to look for better products at a more affordable price.

amount of \$47,177.89.⁷

AND IT IS SO ORDERED.

Columbia, South Carolina,

April 14, 2000.


UNITED STATES BANKRUPTCY JUDGE

⁷ After the ruling in this matter but prior to the entry of this Order, counsel for Debtor advised the Court, by letter dated April 4, 2000, that Marchem had modified its demand to have its claim paid in full in order for it to further provide its products to Debtor. The letter informed the Court that, as a result of Debtor's negotiations with Marchem concerning the payment of the Marchem's pre-petition claim, Marchem had agreed to accept immediate payment of 50% of its pre-petition claim, approximately in the amount of \$23,589, with the remaining claim to be paid through the Chapter 11 Plan. On this basis, Marchem agreed to continue to provide Debtor with its coating on a "cash in advance" basis.